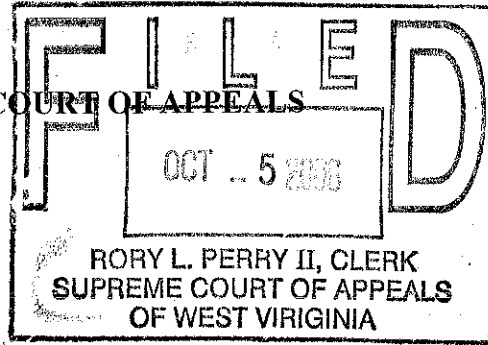


IN THE WEST VIRGINIA SUPREME COURT OF APPEALS



R. EDWARD HAMRICK, JR., M.D.,

Plaintiff below, Appellant,

v.

Docket No. 33107

**CHARLESTON AREA MEDICAL CENTER, INC.,
a West Virginia Not For Profit Corporation,**

Defendant below, Appellee.

**FROM THE CIRCUIT COURT OF KANAWHA COUNTY
The Honorable James C. Stucky
NO. 05-C-472**

RESPONSE TO BRIEF OF DR. HAMRICK

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I. INTRODUCTION

R. Edward Hamrick, Jr., M.D. (“Dr. Hamrick”) and only Dr. Hamrick is seeking this Court’s review of the trial court’s February 24, 2006, order (“Order”) granting Charleston Area Medical Center’s (“CAMC”) Motion for Summary Judgment and denying a competing motion for summary judgment filed by Dr. Hamrick and nine other doctors. Those other doctors were M. Zafrullah Khan, M.D., Nestor F. Dans, M.D., M. Humayun Rashid, M.D., Firasat Malik, M.D., M. Salim Ratnani, M.D., Kee C. Lee, M.D. Sulaiman Hasan, M.D., and Thoracic & Cardiovascular Associates, Inc. (collectively, the “Non-Appealing Plaintiffs”). Dr. Hamrick and only Dr. Hamrick appealed the Order by filing a petition for appeal on April 7, 2006 (“Dr. Hamrick’s Petition”). The Court granted Dr. Hamrick’s Petition, and, like the Petition, that Order plainly reflects that the sole appellant is Dr. Hamrick. The Non-Appealing Plaintiffs appear nowhere on any of these papers.

The situation changed with the filing of Dr. Hamrick’s brief on the merits of this appeal (the “Merits Brief”¹). The Merits Brief attempts to effect a unilateral resurrection of the the Non-Appealing Plaintiffs’ claims by adding their names to both the style and the text of the Merits Brief. This was no mere slip of the word processor, but rather a deliberate act. Not only was the caption altered, but each and every reference to Dr. Hamrick alone in the body of the brief has been changed to read “the Doctors” and “these nine doctors.” Thus, the drafters of the Merits Brief knew exactly what they were doing.² These revisions, however, are not adequate to add parties to an appeal and, as noted, Dr. Hamrick and only Dr. Hamrick remains the sole appellant in this action.

¹ The Merits Brief is titled “Brief of Appellants R. Edward Hamrick, Jr., M.D. *ET AL*” and was filed on September 7, 2006.

² Compare Pet. by Dr. R. Edward Hamrick, Jr., *Hamrick v. Charleston Area Medical Center* (Cir.Ct. Kanawha County 2005) (No. 05-C-472) with Br. of Appellants R. Edward Hamrick, Jr., M.D., et al., *Hamrick v. Charleston Area Medical Center* (W. Va. 2006) (No. 33107).

Although the Merits Brief makes hash of the parties to this appeal, the substantive issue remains the same: whether CAMC's Medical Staff Executive Committee ("MSEC") is a "governing body" under the terms of the Open Hospital Proceedings Act ("OHPA" or "Act").³ Upon consideration of the stipulated record⁴ and the legal arguments set forth in the parties' competing motions and memoranda, the trial court held that the OHPA contemplates that each hospital subject to the Act will have a single "governing body" and that the Board of Trustees fulfills such role at CAMC. Accordingly, the trial court further concluded that the MSEC is not a "governing body" and thus is not subject to the open meeting requirements set forth in the OHPA.⁵ CAMC submits this response to Dr. Hamrick's Brief and asks the Court to affirm the trial court's Order on the basis of the legal arguments set forth below.

II. STANDARD OF REVIEW

When an appeal is taken from a circuit court's order granting summary judgment, the West Virginia Supreme Court of Appeals will review the lower court's entry of such order *de novo*.⁶

III. STATEMENT OF THE CASE

Dr. Hamrick filed the underlying civil action in the Circuit Court of Kanawha County, West Virginia on March 3, 2005, alleging that the MSEC is a "governing body" subject

³ W. Va. Code § 16-5G-1, *et seq.*

⁴ Despite Dr. Hamrick's reference to the Amended Complaint as authority for his allegations regarding CAMC's conduct and equipment, the parties stipulated below to a factual record including only CAMC's governing documents (e.g., CAMC Bylaws, Medical Staff Bylaws, Credentials Policy, Organization and Functions Manual) and MSEC and Board of Trustees meeting minutes. The parties did *not* stipulate to the accuracy of the factual allegations set forth in any pleadings below and, thus, such factual allegations were not part of the record that was submitted to the trial court for consideration in deciding the cross motions for judgment.

⁵ See Order of February 24, 2006, p. 2, *Hamrick* (No. 05-C-472) (Doc. No. 8 of Dr. Hamrick's Designated R.).

⁶ *Koffler v. City of Huntington*, 196 W.Va. 202, 205, 469 S.E.2d 645, 647 (1996) (citing Syl. pt. 1, *Painter v. Peavy*, 192 W.Va. 189, 451 S.E.2d 755 (1994)).

to the open meeting requirements of the OHPA.⁷ CAMC denied such allegations on the basis that: (1) the OHPA contemplates only one governing body at a hospital; (2) the Board of Trustees is CAMC's governing body; and (3) even if the Act did permit a hospital to have more than one governing body, the MSEC does not satisfy the OHPA definition of "governing body" and, thus, is not subject to the Act.⁸

Dr. Hamrick also asked the Court to enter a preliminary injunction requiring the MSEC to follow the OHPA's open meeting requirements during the pendency of the lawsuit.⁹ Noting that Dr. Hamrick had the uncontested right to attend meetings of CAMC's Board of Trustees, the trial court refused to issue the requested preliminary injunction because the likelihood of harm to Dr. Hamrick in the absence of an injunction was no greater than the harm that CAMC would suffer if an injunction were issued.¹⁰

Nothing at all happened in the lawsuit until August 30, 2005, when Dr. Hamrick amended his complaint to add the Non-Appealing Plaintiffs and to make certain allegations regarding their personal complaints with CAMC.¹¹ Dr. Hamrick and the Non-Appealing Plaintiffs then filed yet another motion for a preliminary injunction seeking to require the MSEC to follow the strictures of the OHPA during the pendency of the lawsuit.¹² Following a partial hearing on the second motion for preliminary injunction, Judge Stucky suggested that the parties

⁷ See Pl.'s Verified Compl. and Mot. for Prelim. Inj., *Hamrick* (No. 05-C-472) (Doc. No. 1 of Dr. Hamrick's Designated R.).

⁸ See Appellee's Mem. in Supp. of Charleston Area Medical Center, Inc.'s Mot. for Summ. J. generally, *Hamrick* (No. 05-C-472).

⁹ *Id.*

¹⁰ See Order of May 2, 2005, *Hamrick* (No. 05-C-472) (Doc. No. 1 of Appellee's Designated R.). The harm to CAMC would have resulted from the burden of having another hospital committee subject to the notice and other procedural requirements that the OHPA imposes on "governing bodies."

¹¹ See Pls.' Am. Verified Compl. and Mot. for Prelim. Inj., *Hamrick* (No. 05-C-472) (attached to Doc. No. 3 of Dr. Hamrick's Designated R.). Note that Dr. Hamrick is the only plaintiff below who is a party to the current appeal.

¹² *Id.*

agree to permit Plaintiffs¹³ or Plaintiffs' counsel to address the MSEC at the next regular meeting of the MSEC in lieu of pursuing the preliminary injunction. The parties agreed to Judge Stucky's recommended resolution, as reflected in Judge Stucky's October 17, 2005, order, and Plaintiffs' counsel addressed the MSEC on Plaintiffs' behalf at the December 8, 2005 MSEC meeting.¹⁴

Thereafter parties conducted limited discovery. Then, in December 2005, the parties reached an agreement as to the procedure they would follow to resolve the entire case. The parties agreed that the case presented a single legal issue – i.e., whether the MSEC was a “governing body” under the Act – and that issue could be resolved by stipulating a record and submitting competing motions for summary judgment. Judge Stucky agreed to this plan, and the parties filed briefs with the trial court and submitted the case without oral argument. On February 24, 2006, the trial court issued the Order granting CAMC's motion for summary judgment and dismissing the case from its docket. The Order addressed all the arguments submitted by the parties and concluded that: (1) the OHPA contemplates each hospital having only one “governing body”; (2) CAMC's “governing body” is the Board of Trustees; and (3) the MSEC is not a “governing body” subject to the OHPA.¹⁵

IV. STATEMENT OF FACTS

Dr. Hamrick's review of the facts misstates the record in this case and, therefore, requires correction. As noted above, Dr. Hamrick agreed to submit this case to Judge Stucky

¹³ All members of CAMC's Medical Staff are welcome to attend all MSEC meetings. Such fact is evidenced by the minutes of the December 8, 2005 MSEC meeting, which indicate that at least three other physicians on CAMC's Medical Staff who are not MSEC members attended the meeting without special invitation or court order. *See* CAMC Mem. in Supp. of Charleston Area Medical Center, Inc.'s Mot. for Summ. J. at Ex. H. Accordingly, the agreement reached in resolution of Plaintiffs' second motion for preliminary injunction was not necessary to permit Plaintiffs' attendance at the December 8, 2005 MSEC meeting.

¹⁴ *See* Order of October 17, 2005, *Hamrick* (No. 05-C-472) (Doc. No. 3 of Appellee's Designated R.).

¹⁵ *See* Order of February 24, 2006, p. 2, *Hamrick* (No. 05-C-472).

based on stipulated facts. That stipulation did not encompass the Amended Complaint and the factual allegations regarding the complaints Dr. Hamrick and the Non-Appealing Plaintiffs may have with CAMC and its administration. Instead this stipulation record focuses on the only matters germane to the issue: (a) the corporate governance structure at CAMC, (b) the constitution and jurisdiction of the MSEC, and (c) the relationship between the MSEC and the Board of Trustees. This section addresses those subjects as they are reflected in the stipulated record.

CAMC is a West Virginia nonprofit corporation.¹⁶ Section § 31E-8-801 of the West Virginia Code requires that, as a nonprofit corporation, CAMC have a board of directors that exercises, or authorizes the exercise of, “[a]ll corporate powers.”¹⁷ As permitted by section 31E-1-150(3) of the Code, CAMC chose to call its board of directors by the name “Board of Trustees.” The Board of Trustees bears the ultimate legal responsibility for CAMC and its actions.¹⁸ **Most importantly, the Board of Trustee’s meetings are held in full compliance with the Act.**¹⁹

As pertinent to this appeal, the Board of Trustees oversees the Medical Staff. Although the Medical Staff is responsible for the quality of patient care at CAMC, it must keep the Board

¹⁶ CAMC, Bylaws of CAMC 1 (2003) (“CAMC Bylaws”) (attached as Ex. 1 to the Pls.’ Mot. for Summ. J., i.e. Doc. No. 4 of Dr. Hamrick’s Designated R.).

¹⁷ W. Va. Code § 31E-8-801(b) (emphasis added).

¹⁸ See CAMC Bylaws at 3 (attached as Ex. 2 to the Pls.’ Mot. for Summ. J., i.e. Doc. No. 4 of Dr. Hamrick’s Designated R.) (calling the Board of Trustees “the governing body” and giving it “general charge and supervision of the business of the Corporation, including the operation and management of its hospitals and all other activities or facilities”); CAMC, Medical Staff Bylaws 1 (2004) (“Medical Staff Bylaws”) (attached as Ex. 2 to the Pls.’ Mot. for Summ. J., i.e. Doc. No. 4 of Dr. Hamrick’s Designated R.) (noting that the “Board of Trustees . . . has the overall responsibility for the Hospital or its designated committee”).

¹⁹ CAMC Bylaws at 6-8 (attached as Ex. 1 to the Pls.’ Mot. for Summ. J., i.e. Doc. No. 4 of Dr. Hamrick’s Designated R.). A full description of the powers and responsibilities of CAMC’s Board of Trustees is found in CAMC’s Memorandum in Support of its Motion for Summary Judgment at 3-5.

of Trustees abreast of the quality of care.²⁰ Further, all of the Medical Staff's governing documents must be approved by the Board of Trustees. These documents "[d]escribe the structure of the Medical Staff[,] . . . set forth the responsibilities of . . . the Medical Staff[,] . . . " govern the procedures for recommendations to the Board of Trustees for appointment to the Medical Staff, provide for the "continuing review and appraisal of the quality of professional care rendered in the hospital[] . . . ," and develop procedures for the termination of Medical Staff appointment and privileges.²¹ While the Medical Staff, through its MSEC, makes recommendations to the Board of Trustees, the "Board of Trustees reserves the authority to appoint individuals to the Medical Staff,²² to grant clinical privileges and to withdraw such appointment and clinical privileges."²³

²⁰ CAMC Bylaws at 12-13 (attached as Ex. 1 to the Pls.' Mot. for Summ. J., i.e. Doc. No. 4 of Dr. Hamrick's Designated R.).

²¹ CAMC Bylaws at 13 (attached as Ex. 1 to the Pls.' Mot. for Summ. J., i.e. Doc. No. 4 of Dr. Hamrick's Designated R.).

²² The MSEC does not have the authority to halt a physician's application for medical staff appointment at CAMC. The typical process by which a physician obtains initial medical staff appointment at CAMC is as follows: (1) the physician submits an application for staff appointment to the Vice President for Medical Affairs; (2) the relevant department chief provides a report on the application; (3) the Credentials Committee reviews the chief's report; (4) the Credentials Committee makes a recommendation regarding the application to the MSEC; (5) the MSEC considers the Credentials Committee's recommendation and make its own recommendation regarding the application to the Board; and (6) if the MSEC recommends the applicant for medical staff appointment or privileges, the Board either grants or denies the application. CAMC Credentials Policy at 14-20 (attached as Ex. C to CAMC's Mot. for Summ. J., i.e., Doc. No. 5 of Dr. Hamrick's Designated R.). Should the MSEC decide not to recommend an applicant for medical staff appointment or privileges, the applicant has a right to a hearing before a Hearing Panel. *Id.* at 53. The Hearing Panel determines whether the MSEC's decision not to recommend an applicant was in error. *Id.* at 62. The Hearing Panel reports its decision directly to the CAMC President. *Id.* at 63. The Hearing Panel's decision may be further appealed to the Review Panel. *Id.* at 63-64. Upon review of the Hearing Panel's decision, the Review Panel makes a recommendation of final action to the Board. *Id.* at 64. The Board retains ultimate authority to grant or deny appointment to the medical staff. *Id.* at 65.

²³ CAMC Bylaws at 12-13 (footnote added) (attached as Ex. 1 to the Pls.' Mot. for Summ. J., i.e. Doc. No. 4 of Dr. Hamrick's Designated R.); Medical Staff Bylaws at 25 (attached as Ex. 2 to the Pls.' Mot. for Summ. J., i.e. Doc. No. 4 of Dr. Hamrick's Designated R.). CAMC's Board of Trustees is within its legal rights to act independently of the Medical Staff's recommendations. Federal Medicare regulations state that the governing body may appoint "other practitioners" to the medical staff "in accordance with State law[.]" which provides that the "medical staff shall be appointed by the governing body of the hospital in accordance with its bylaws, rules and regulations." 42 C.F.R. § 482.22(a); W. Va. Code St. R. § 64-12-14.1.3.

The Medical Staff is comprised of more than 600 doctors who are divided into fourteen departments.²⁴ Additionally, CAMC's bylaws provide for the creation of an "Executive Committee and a Credentials Committee and such other committees as shall be necessary and desirable."²⁵ The two named committees (i.e., the Executive Committee and the Credentials Committee) are required to "make reports and recommendations directly to the Board of Trustees, with regard to the matters within their jurisdiction."²⁶ At CAMC, the "Executive Committee" (i.e., the MSEC) oversees "activities related to the functions of the Medical Staff and performance improvement activities regarding the professional services provided by individuals with clinical privileges."²⁷ The voting members of the MSEC are the "officers of the Medical Staff, the Immediate Past Chief of Staff, the chief of each department of the Medical Staff and the Associate Vice President of WVU Health Sciences Center – Charleston Division."²⁸ With the exception of the Associate Vice President of WVU Health Sciences Center – Charleston Division,²⁹ each voting member of the MSEC is elected by a vote of all or part of the Medical Staff.³⁰ Thus, the MSEC serves as a form of representative assemblage of the 600 members of the Medical Staff.

²⁴ Organization and Functions Manual at 4 (attached as Ex. D to CAMC's Mot. for Summ. J., i.e., Doc. No. 5 of Dr. Hamrick's Designated R.).

²⁵ CAMC Bylaws at 13 (attached as Ex. 1 to the Pls.' Mot. for Summ. J., i.e. Doc. No. 4 of Dr. Hamrick's Designated R.).

²⁶ *Id.* The Credentials Committee's duties include evaluating the qualifications of individuals applying or reapplying for Medical Staff appointment and/or privileges. Organization and Functions Manual at 11 (attached as Ex. D to CAMC's Mot. for Summ. J., i.e., Doc. No. 5 of Dr. Hamrick's Designated R.).

²⁷ Medical Staff Bylaws at 24-25 (attached as Ex. 2 to the Pls.' Mot. for Summ. J., i.e. Doc. No. 4 of Dr. Hamrick's Designated R.).

²⁸ *Id.* at 24.

²⁹ As the title suggests, the Associate Vice President of WVU Health Sciences Center – Charleston Division is a position of West Virginia University. WVU's Charleston teaching facility is housed at CAMC.

³⁰ Medical Staff Bylaws at 24, 13-17, 19 (attached as Ex. 2 to the Pls.' Mot. for Summ. J., i.e. Doc. No. 4 of Dr. Hamrick's Designated R.). The officers of the Medical Staff and the Immediate Past Chief of Staff are elected by a vote of the full Medical Staff. *Id.* at 13-17. Each department chief is elected by a vote of those appointees to the Medical Staff who are part of his or her department. *Id.* at 19.

Additionally, the Medical Staff Pharmacy and Therapeutics Committee, the Medical Staff Tissue, Transfusion and Procedures Committee, the Medical Staff Clinical Documentation Quality Committee, the Medical Staff Cancer Committee, and the Credentials Committee report to the MSEC.³¹ As the representative of the Medical Staff, the MSEC acts “on behalf of the Medical Staff” between meetings of the full Staff and: (1) makes recommendations to the Board of Trustees regarding the structure of the Medical Staff, the appointment and termination of appointments to the Medical Staff, and medical care improvement initiatives; (2) consults with CAMC’s administration regarding the quality of medical care; (3) acts on reports and recommendations of the Medical Staff committees and departments; (4) reviews its own governing documents; and (5) performs other duties as assigned.³² In sum, the MSEC is limited to matters concerning Staff appointment and the quality of care at CAMC. And, even in these areas, it is subordinate to the Board of Trustees.³³

From the legal, financial, and practical standpoints, the Board of Trustees is in charge of CAMC and is the ultimate arbiter of all decisions for CAMC. It makes sure the finances are in order, and it oversees all committees and staff of the hospital, including the Medical Staff. Every other group, including the MSEC, is but a component part of CAMC and, as such, must report to and gain authorization from the Board of Trustees to act.

³¹ Organization and Functions Manual at 7 (attached as Ex. D to CAMC’s Mot. for Summ. J., i.e., Doc. No. 5 of Dr. Hamrick’s Designated R.).

³² Medical Staff Bylaws at 25 (attached as Ex. 2 to the Pls.’ Mot. for Summ. J., i.e. Doc. No. 4 of Dr. Hamrick’s Designated R.).

³³ See CAMC Bylaws at 13 (attached as Ex. 1 to the Pls.’ Mot. for Summ. J., i.e. Doc. No. 4 of Dr. Hamrick’s Designated R.).

V. ARGUMENT

Based on the legal arguments set forth below, the trial court properly concluded that the Act contemplates that each hospital subject to the Act will have a single “governing body” and that, at CAMC, the Board of Trustees is the “governing body.”

A. The trial court properly concluded that the OHPA contemplates only one “governing body.”

Dr. Hamrick argues that the trial court erred in finding that the OHPA contemplates that each hospital subject to the Act will have only one governing body. The considerations that Dr. Hamrick suggests support his position (i.e., the plain language of the OHPA, the legislative intent of the OHPA, and the general approach to interpreting the OHPA), however, all support the trial court’s conclusion. As shown below, all such factors support the conclusion that the OHPA contemplates that each hospital subject to the Act will have a single governing body. At CAMC, the Board of Trustees clearly fills this role and, thus, only the Board of Trustees is subject to the open meeting requirements of the OHPA.

1. The plain language of the OHPA reveals that each hospital subject to the OHPA has only one “governing body.”

The OHPA defines the term “[g]overning body” to mean “the board of directors or other group of persons having the authority to make decisions for or recommendations on policy or administration to a hospital owned or operated by a nonprofit corporation, nonprofit association or local governmental unit . . .”³⁴ The Act calls it the “governing body” rather than “governing bodies.” Assuming the Legislature understood the difference between singular and plural forms, the statute envisions each hospital having only one governing body.

The Legislature’s intent also is evidenced by its choice of the word “or” – rather than “and” – in the definition of “governing body.” Dr. Hamrick’s interpretation of the OHPA to

³⁴ W. Va. Code § 16-5G-2(3).

contemplate more than one governing body confuses the disjunctive “or” with the conjunctive “and.” The Supreme Court has repeatedly stated “that where the disjunctive ‘or’ is used, it ordinarily connotes an alternative between the two clauses it connects.”³⁵ As applied to the subject statute, a “governing body” is either (a) the “board of directors” or (b) some “other group of persons having the authority to make decisions for or recommendations on policy or administration to a hospital.”

The trial court’s decision, however, is not based solely on the proposition that the Legislature knows how to use the English language. It is further bolstered by the more significant but equally unassailable proposition that the Legislature is familiar with the legislation it passes. The Legislature also enacted the corporate governance rules applicable to CAMC.³⁶ As noted above, the Legislature requires that West Virginia nonprofit corporations must “have a board of directors.”³⁷ The board of directors is defined as “*the* group of persons vested with management of the affairs of the corporation *irrespective of the name* by which the group is designated.”³⁸ Thus, by the very fact that CAMC is a nonprofit corporation, the Board of Trustees is the board of directors because all authority resides in the Board of Trustees, even though it is not termed a “board of directors.”³⁹ By statutory fiat, CAMC’s Board of Trustees exercises, or authorizes the exercise of, “[a]ll corporate powers.”⁴⁰

³⁵ *State v. Easton*, 203 W. Va. 631, 643, 510 S.E.2d 465, 477 (1998) (quoting *State v. Rummer*, 189 W. Va. 369, 377, 432 S.E.2d 39, 47 (1993) (internal quotations and citations omitted)); accord *Holsten v. Massey*, 200 W. Va. 775, 790, 490 S.E.2d 864, 879 (1997); *Albrecht v. State*, 173 W. Va. 268, 271, 314 S.E.2d 859, 862 (1984); *State v. Elder*, 152 W. Va. 571, 576-77, 165 S.E.2d 108, 112 (1968).

³⁶ W. Va. Code § 31E-1-101, *et seq.*

³⁷ W. Va. Code § 31E-8-801(a).

³⁸ W. Va. Code § 31E-1-150 (Supp. 2005) (emphasis added). Thus, CAMC’s practice of naming its board of directors the “Board of Trustees” is contemplated and endorsed by the Code.

³⁹ CAMC Bylaws at 3 (attached as Ex. 1 to the Pls.’ Mot. for Summ. J., i.e. Doc. No. 4 of Dr. Hamrick’s Designated R.).

⁴⁰ W. Va. Code § 31E-8-801(b) (emphasis added).

Nonprofit corporations, however, are not the only type of hospitals subject to the OHPA.⁴¹ Some hospitals subject to the Act (i.e., hospitals owned and operated by nonprofit associations or local government units) do not operate under a statutory mandate to have a board of directors. When considered in this context, the distinction drawn by the Legislature's disjunctive definition of "governing body" makes perfect sense. Rather than leave hospitals owned and operated by nonprofit associations or local government units outside the scope of the Act, the definition of the "governing body" goes beyond just "board of directors" to include whatever body performs the functions of the board of directors in an organization without a board of directors: such "*other* group of persons having the authority to make decisions for or recommendations on policy or administration to a hospital owned or operated by a nonprofit corporation, nonprofit association or local governmental unit."⁴²

In short, this Court must assume the Legislature understood and intended its use of the terms "governing body" (in the singular), "or," "nonprofit corporation," and "board of directors" to be read in context of their plain meanings and other related statutes. So read, each hospital subject to the OHPA may only have one governing body and only the board of directors can be the governing body of a nonprofit corporation. Accordingly, the plain language of the OHPA, especially in light of the JCAHO standards, supports the lower court's conclusions that each hospital subject to the OHPA has only one governing body and that CAMC's governing body is the Board of Trustees. The only alternative is to assume that the Legislature did not know what it was doing when it drafted the OHPA, and *that* this Court cannot do.

⁴¹ W. Va. Code § 16-5G-1.

⁴² W. Va. Code § 16-5G-2(3) (emphasis added).

2. The legislative intent of the OHPA, as expressly set forth in the West Virginia Code, is achieved by the public having access to the meetings of CAMC's Board of Trustees.

Dr. Hamrick's argument that the OHPA should be read expansively to accomplish its purpose overlooks the fact that the purpose of the OHPA *is* achieved by interpreting it, consistent with its plain language, to apply to a single "governing body." Because every action of the MSEC must be reviewed and approved by the Board of Trustees, public access to the meetings of the Board of Trustees is sufficient to provide the public with the opportunity to "remain informed of the decisions and decision making processes affecting the health services on which they so vitally depend" ⁴³ The excessively broad and facially inconsistent reading of the OHPA advanced by Dr. Hamrick is not necessary to accomplish its express purpose, and, thus the court below did not err in finding that the OHPA contemplated that each hospital subject to the OHPA would have only one governing body.

A close reading of the legislative intent section of the OHPA also supports the conclusion that the Legislature intended to provide the public with access to the meetings and decision-making process of a hospital's board of directors (or, in CAMC's case, the Board of Trustees):

The legislature hereby finds and declares that *hospitals owned or operated by nonprofit corporations*, nonprofit associations or local governmental units are relied on by the citizens of this State for services essential to their health and well-being. The legislature further finds and declares that *public funds from various sources and by various means contribute significantly to the revenues and operations of such institutions*. Therefore, it is in the best interest of the people of this State for *all proceedings of the boards of directors or other governing bodies of such hospitals to be conducted in an open and public manner so that the people can remain informed of the decisions and decision making processes affecting the health services* on which they so vitally depend and

⁴³ W.Va. Code § 16-5G-1. See May 2, 2005 order of trial court denying Dr. Hamrick's first motion for a preliminary injunction.

which they help support through tax exemptions, public funding and other means.⁴⁴

As the emphasized text demonstrates, the Legislature expressly declared that the public be able to attend the “proceedings of the boards of directors” of hospitals owned by nonprofit corporations. Dr. Hamrick’s effort to expand the Act’s intent to suggests that the public has the same interest in attending meetings of the Medical Staff runs right into the Act itself. The OHPA expressly exempts from its scope “medical staff conferences.”⁴⁵ If the Legislature had the intent ascribed to it by the Dr. Hamrick, this exclusion would make no sense.

A far better reading of the Act assumes that the Legislature meant what it said and said what it meant. Under that reading the clear focus of the act is on corporate governance of the hospital, and, for a nonprofit corporation, that function is carried out by CAMC’s Board of Trustees. Accordingly, the legislative intent of the OHPA, as set forth in the Act itself, does not mandate or even support the conclusion advanced by Dr. Hamrick. Rather, such intent supports the conclusion reached by the trial court.

3. Other relevant authorities support the proposition that CAMC has a single “governing body.”

If legal precedent and common sense are not enough to resolve this issue, there is more. CAMC is accredited by the Joint Commission on Accreditation of Healthcare Organization (“JCAHO”). The most recent revisions to the JCAHO’s Medical Staff Standards also specifically illustrate that CAMC’s Board of Trustees and not the MSEC is the “governing body.” The revised JCAHO standards state in a numerous places that any recommendation by

⁴⁴ *Id.* (emphasis added).

⁴⁵ W. Va. Code § 16-5G-2(5) defines “[m]eeting” to mean “the convening of a governing body of a hospital for which a quorum is required in order to make a decision or to deliberate toward a decision on any matter: Provided, That a medical staff conference is not a meeting . . .”

the medical staff must be approved by "the governing body."⁴⁶ The revisions to MS.1.20 emphasize that medical staff action must be "approved by the governing body."⁴⁷ The JCAHO's strong language subjecting the organized medical staff action to governing body approval leaves no doubt that in this case that CAMC, under the JCAHO standards, has only one governing body - the Board of Trustees.

The Court can also find guidance in federal Medicare/Medicaid regulations and West Virginia regulations created by the state Board of Health regarding hospital licensure, in which references to the "governing body" or a similar term (i.e., "governing authority" or "governing board") are in the singular form.⁴⁸ Moreover, on the state's application for a hospital license, the applicant is asked to name its "Governing Body," again in the singular form.⁴⁹

⁴⁶ See, e.g., JCAHO's Medical Staff Standards Overview ("The hospital's governing body has the ultimate authority ..."), MS.1.10 ("The organized medical staff is accountable to the governing body ..."), MS.1.20 ("Medical staff bylaws address self governance and accountability to the governing body."), MS.1.40 ("The medical staff executive committee makes recommendations ... directly to the governing body"), Credentialing and Privileging Overview (although the organized medical staff makes recommendations on the granting of privileges and appointments, "the ultimate authority for granting, restricting, and revoking privileges rests with the governing body"), Rationale for MS.4.10 (medical staff makes privilege recommendations to the governing body for approval or rejection), Elements of Performance for MS.4.10 ("The credentialing process is approved by the governing body"), Elements of Performance for MS.4.15 (recommendations by the organized medical staff are approved by the governing body), Elements of Performance for MS.4.20 (recommendations by the organized medical staff are approved by the governing body; "The governing body ... has final authority for granting, renewing, or denying privileges") and Elements of Performance for MS.4.45 (recommendations by the organized medical staff are approved by the governing body), http://www.jointcommission.org/NR/rdonlyres/0FA42BE2-7C43-46CA-957E-BB3030D5C56A/0/hap_ms_07.pdf.

⁴⁷ See http://www.jointcommission.org/NR/rdonlyres/6ACC3C3B-F60F-45EC-A887-A5249152A0A3/0/fr_Standard_MS_1_20.pdf.

⁴⁸ See 42 C.F.R. §§ 482.11 *et seq.*; 42 C.F.R. §§ 482.21-22; W. Va. Code St. R. §§ 64-12-7 *et seq.*; W. Va. Code St. R. §§ 64-12-14.

⁴⁹ See CAMC General, CAMC Memorial, and CAMC Women's & Children's Hospital Licensure Applications (attached as Ex. K to Appelle's Mot. for Summ. J., i.e., Doc. No. 5 of Dr. Hamrick's Designated R.).

4. **The interpretation of the Open Governmental Proceedings Act bears no relevance to the proper interpretation of the OHPA.**

Contrary to Dr. Hamrick's assertion that this Court should look to the Open Governmental Proceedings Act ("OGPA")⁵⁰ for guidance, fundamental differences underlie the OGPA and the OHPA. The OGPA is rooted in the State's Constitution and the notion that the government serves the people.⁵¹ Specifically, the Legislature found that

public bodies in this state exist for the *singular* purpose of representing citizens of this state in governmental affairs, and it is, therefore, in the best interests of the people of this state for all proceedings of all public bodies to be conducted in an open and public manner. The Legislature hereby further finds and declares that the citizens of this state do not yield their sovereignty to the governmental agencies which serve them. The people *in delegating authority* do not give their public servants the right to decide what is good for them to know and what is not good for them to know. The people insist on remaining informed *so that they may retain control over the instruments of government created by them.*⁵²

These properly guide our government, but they do not apply to a nonprofit hospital like CAMC. In contrast to the OGPA, the OHPA is predicated on a much more limited premise: to varying degrees, public money supports the hospitals subject to the act, and the public has a concomitant need and/or right to see how that money is used.⁵³ The public did not create CAMC, and the

⁵⁰ W. Va. Code § 6-9A-1, *et seq.*

⁵¹ *McComas v. Bd. of Educ. of Fayette County*, 197 W. Va. 188, 197, 475 S.E.2d 280, 289 (1996).

⁵² W. Va. Code § 6-9A-1 (emphasis added).

⁵³ The Legislature declared:

that public funds from various sources and by various means contribute significantly to the revenues and operations of such institutions. Therefore, it is in the best interest of the people of this state for all proceedings of the boards of directors or other governing bodies of such hospitals to be conducted in an open and public manner so that the people can remain informed of the decisions and decision making processes affecting the health services on which they so vitally depend and which they help support through tax exemptions, public funding and other means.

public did not delegate its authority to CAMC, and, therefore, unlike governmental bodies, the public does not “retain control” over CAMC. Due to this fundamental difference, the OGPA, and cases decided under the OGPA, are inapposite to the Act and this case.⁵⁴

Additionally, the cases decided under West Virginia’s OGPA by the Dr. Hamrick are factually distinct from this case. In *McComas*, four of five school board members met in private with a school superintendent and two associate superintendents to discuss school consolidation one day before the school board was scheduled to meet to address the same issue.⁵⁵ The Court stated that the members of the Board of Education were clearly a “governing body” under the OGPA.⁵⁶ Because a quorum of the Board had a pre-arranged meeting with “the three highest ranking county administrators” to discuss a “highly topical matter of school business” at the Board’s office, a “meeting” occurred for the purposes of the OGPA.⁵⁷ This case did not

W.Va. Code § 16-5G-1.

⁵⁴ But even if the OGPA was persuasive to this action, it recognizes that no need exists for holding every meeting open.

The Legislature finds . . . that openness, public access to information and a desire to improve the operation of government do not require nor permit every meeting to be a public meeting. The Legislature finds that it would be unrealistic, if not impossible, to carry on the business of government should every meeting, every contact and every discussion seeking advice and counsel in order to acquire the necessary information, data or intelligence needed by a governing body were required to be a public meeting. It is the intent of the Legislature to balance these interests in order to allow government to function and the public to participate in a meaningful manner in public agency decision making.

W. Va. Code § 6-9A-1. This statement of legislative intent, which suggests that some of the process leading up to a governing body’s final decision-making process need not be open to the public, further supports the notion that the MSEC meetings need not be open to the public.

⁵⁵ *McComas*, 197 W. Va. at 192, 475 S.E.2d at 284.

⁵⁶ *Id.* at 194, 475 S.E.2d at 286.

⁵⁷ *Id.* at 200, 475 S.E.2d at 292. In *Peters v. County Comm’n of Wood County*, 205 W. Va. 481, 519 S.E.2d 179 (1999), the County Commission, an undisputed governing body under the OGPA, held three closed meetings on the rationale that the information discussed was protected by the attorney-client privilege. *Id.* at 483-84, 486-87, 519 S.E.2d at 181-82, 184-85. The Court acknowledged a limited attorney-client privilege exception to the OGPA and remanded the case to determine if the exception was satisfied. *Id.* at 489-90, 519 S.E.2d at 187-88. This case is inapposite.

address what constitutes a “governing body” for purposes of the Act, let alone whether there can be multiple governing bodies. It addressed a closed meeting of a sub-group of an undisputed governing body under the OGPA. The Board of Trustees and the MSEC are two separate and distinct bodies at CAMC; one is not a sub-group of the other. The case simply does not apply to this action in any meaningful way.⁵⁸

B. The trial court properly concluded that the stipulated record supports the conclusion that the MSEC is not a “governing body” under the OHPA.

Given the proper interpretation of the OHPA to contemplate only one “governing body[,]” and given Dr. Hamrick’s failure to allege that the Board of Trustees (i.e., the entity at CAMC that functions as the governing body for the purposes of the OHPA) is not subject to the OHPA as a governing body, Dr. Hamrick’s argument regarding the MSEC’s responsibilities is irrelevant. Nevertheless, even if the Act did permit a hospital to have two governing bodies, CAMC’s governing documents clearly distribute authority and responsibility in such a way as to leave no doubt that the Board of Trustees is the only entity at CAMC that satisfies the definition of “governing body” provided in the OHPA. The fact that two doctors, each elected by a full vote of the CAMC Medical Staff, vote on both the Board of Trustees and the MSEC does nothing to change this conclusion.

⁵⁸ Dr. Hamrick tries to bolster his case by citing cases decided under Florida’s “Government in the Sunshine Law,” Fla. Stat. Ann. § 286.011. *News-Press Publ’g Co., Inc. v. Carlson*, 410 So.2d 546 (Fla. Dist. Ct. App. 1982); *Dascott v. Palm Beach County*, 877 So.2d 8 (Fla. Dist. Ct. App. 2004). Contrary to Dr. Hamrick’s assertion, the governing law in these cases was not an open hospital act; it was an open government act, and the hospital at issue in *Carlton* was a public hospital. 410 So.2d at 547. The Florida statute does not even reference a “governing body.” Rather, that statute applies to the “meetings of any board or commission of any state agency or authority or of any agency or authority of any county, municipal corporation, or political subdivision.” Fla. Stat. Ann. § 286.011(1). In the case actually discussed by Dr. Hamrick, *Carlson*, the board of directors of a public hospital delegated its budget responsibilities to an *ad hoc* committee created solely for the purpose of creating a budget that year. *Carlson*, 410 So.2d at 547. The Court simply held that, because the board of directors created this committee and delegated its authority to it, the committee should have held its meetings open to the public in the same manner as the board. *Id.* at 549. As explained in the text, the MSEC is not a committee of the Board of Trustees. Neither the statute, the facts, nor the holding in *Carlson* have any bearing on the instant case.

1. CAMC's governing documents support the conclusion that the Board of Trustees, and not the MSEC, "make[s] decisions for or recommendations on policy or administration to a hospital" and, thus, is CAMC's "governing body."

Contrary to Dr. Hamrick's position, CAMC's governing documents support the lower court's conclusion that the Board of Trustees, and not the MSEC, is CAMC's governing body. CAMC's Board of Trustees carries out numerous functions.⁵⁹ Specifically, the Board of Trustees has:

general charge and supervision of the business of . . . [CAMC], including the operation and management of its hospitals and all other activities or facilities. The Board of Trustees may at any time authorize and provide for the borrowing of money by . . . [CAMC] and incidental thereto may mortgage and pledge the assets of . . . [CAMC] as may from time to time reasonably be required in carrying out the purposes of . . . [CAMC]. The Board of Trustees shall annually elect officers . . . The *Board of Trustees shall have the power to appoint such agents and committees as its business shall require and to delegate to such agents and duly constituted committees such power to act for it as may seem expedient and as occasion shall require.* The Board of Trustees shall periodically and as needed review . . . [CAMC's] Bylaws. *Governing documents of the Medical Staff and all auxiliary organizations of . . . [CAMC] shall be submitted to the Board of Trustees for approval.*⁶⁰

As indicated above, the Board of Trustees is the final authority on this broad array of issues, and it then "make[s] decisions for or recommendations on policy or administration to . . . [CAMC]" as required by the Act.⁶¹

As noted, Dr. Hamrick does not dispute that the Board of Trustees is a "governing body." Instead, Dr. Hamrick argues that the MSEC is also a governing body because it makes recommendations on policy to *another governing body* (i.e., the Board of Trustees). The Act,

⁵⁹ CAMC Bylaws at 3 (attached as Ex. 1 to the Pls.' Mot. for Summ. J., i.e. Doc. No. 4 of Dr. Hamrick's Designated R.).

⁶⁰ *Id.* (emphasis added).

⁶¹ W. Va. Code § 16-5G-2(3).

however, requires that recommendations on policy be made by the governing body “to . . . [the] hospital.”⁶² If the statute said that a governing body is a body that reports to another governing body, then Dr. Hamrick’s argument might work – although the statute clearly would not work with such a circular definition.

The MSEC is not a committee of the Board of Trustees. Instead, it is a distinct body created by CAMC’s bylaws. The Board of Trustees, in turn, is authorized to delegate certain tasks to agents and committees;⁶³ the MSEC is one such committee. The delegation to the MSEC is limited: “The Medical Staff Executive Committee is *delegated* the *primary authority* over activities related to the functions of the Medical Staff and performance improvement activities regarding the professional services provided by individuals with clinical privileges.”⁶⁴ Most importantly, the MSEC is still required to report to the Board of Trustees on these matters.⁶⁵ Thus, although the quality of patient care is within the MSEC’s jurisdiction, that jurisdiction is subject to the oversight of the governing body – CAMC’s Board of Trustees. The MSEC also makes recommendations to the Board on the structure of the Medical Staff, the credentialing process, appointments to the Medical Staff, clinical privileges for applicants, the Medical Staff’s involvement with CAMC’s “performance improvement activities[,]” the

⁶² *Id.* (emphasis added).

⁶³ CAMC Bylaws at 3 (attached as Ex. 1 to the Pls.’ Mot. for Summ. J., i.e. Doc. No. 4 of Dr. Hamrick’s Designated R.).

⁶⁴ Medical Staff Bylaws at 24-25 (attached as Ex. 2 to the Pls.’ Mot. for Summ. J., i.e. Doc. No. 4 of Dr. Hamrick’s Designated R.) (emphasis added). The Medical Staff Bylaws also recognize the Board of Trustees’ role as the governing body of CAMC. Medical Staff Bylaws at 1 (noting that the Board of Trustees “has the overall responsibility for . . . [CAMC] . . .”).

⁶⁵ CAMC Bylaws at 13 (attached as Ex. 1 to the Pls.’ Mot. for Summ. J., i.e. Doc. No. 4 of Dr. Hamrick’s Designated R.).

termination of appointments to the Medical Staff, and "hearing procedures."⁶⁶ In each instance, however, the Board of Trustees, again, has the final word on these decisions.⁶⁷

Inexplicably, Dr. Hamrick tries to support his argument that the MSEC is a "governing body" by noting that, on some occasions but not always, the Board of Trustees adopts the recommendations of the MSEC without change. The level of agreement between the delegating body and the subordinate body is not the relevant inquiry. To the contrary, the true test of who governs and who does not occurs when the two bodies disagree, and on this point there can be no dispute. The recommendations of the MSEC have no force unless and until they are ratified or approved by the Board of Trustees. Under such an arrangement, there can be no doubt which body governs.

Dr. Hamrick also tries to back into a finding that the MSEC is a "governing body" because it conducts its meetings only when a quorum is present. To be sure, the statute defines "meeting" as "**the convening of a governing body** of a hospital for which a quorum is required in order to make a decision or to deliberate toward a decision on any matter."⁶⁸ This statute, however, only defines which activities of a governing body constitute meetings. It only applies *after* it is determined that a body is a "governing body." As already pointed out, the far more telling aspect of this particular statute is that it expressly states that "a medical staff conference is not a meeting." In any event, the fact that the MSEC conducts its meetings in a reasonable and orderly manner (i.e. requiring a quorum to make a decision on a recommendation, keeping

⁶⁶ Medical Staff Bylaws at 25 (attached as Ex. 2 to the Pls.' Mot. for Summ. J., i.e. Doc. No. 4 of Dr. Hamrick's Designated R.).

⁶⁷ CAMC Bylaws at 12-13 (attached as Ex. 1 to the Pls.' Mot. for Summ. J., i.e. Doc. No. 4 of Dr. Hamrick's Designated R.); Credentials Policy at 65 (attached as Ex. C to the Mem. in Supp. of CAMC's Mot. for Summ. J., i.e. Doc. No. 5 of Dr. Hamrick's Designated R.).

⁶⁸ W. Va. Code § 16-5G-2(5) (emphasis added).

minutes of the meetings, following Robert's Rules of Order, etc.) does not make its meetings subject to the OHPA.

2. The limited "dual membership" of the Board of Trustees and the MSEC does not convert the MSEC into a governing body.

Dr. Hamrick's suggestion that the fact that a few individuals are voting members of both the MSEC and the Board of Trustees effectively makes the MSEC a "governing body" is nonsensical. In point of fact, only two persons are voting members of both bodies: the current Chief of Staff and the immediate past Chief of Staff. These two doctors sit on the Board of Trustees ex officio. They are not on the MSEC due to any action of the Board of Trustees. Instead, they are *elected by the entire medical staff* to be the Chief of Staff for their year, and, only because of that election do they also become voting members of the Board for the two-year period they serve in that capacity. The inclusion of the Chief of Staff and the immediate past Chief of Staff on the Board of Trustees does not change the MSEC into a "governing body."

Moreover, these two "overlapping" memberships do not constitute a significant portion of either the Board of Trustees or the MSEC. The Board of Trustees is made up of seventeen voting members, and the MSEC is made up of nineteen voting members. Thus, the overlapping members comprise no more than twelve percent of the voting membership of each body and in no way control either the Board of Trustees or the MSEC.

3. The unsubstantiated allegations in Dr. Hamrick's brief cannot turn the MSEC into a "governing body."

Finally, throughout his brief Dr. Hamrick attempts to use the unsubstantiated allegations of his complaint to convert the MSEC into a "governing body" when the law and stipulated facts would not lead to that conclusion. The unsubstantiated complaints of the Non-Appealing Plaintiffs – these matters did not appear in the complaint filed just by Dr. Hamrick –

are not encompassed by the parties' stipulation.⁶⁹ Moreover, whether Dr. Hamrick or the Non-Appealing Plaintiffs are happy with any particular CAMC policy is completely irrelevant to the issue at bar. Every policy – the ones they like and the ones they do not like – goes to the Board of Trustees for its approval before that policy becomes effective. If any doctor, or any other citizen for that matter, wishes to express a view on a matter before the Board of Trustees, they may avail themselves of their rights under the OHPA to do so.

Even when applicable, however, the OHPA only gives one the right to attend and, if time permits, the opportunity to speak about a topic that concerns him or her. This is true of Board of Trustee meetings and decisions as well. The Act grants the public a right to attend the meetings, not the right to dictate an outcome. Even at Board of Trustees meetings, which are governed by the Act, members of the public in attendance might not be given the opportunity to address the Board of Trustees.⁷⁰

Dr. Hamrick also attempts to create a need to include the MSEC within the scope of OHPA by suggesting that doctors are barred from attending these meetings. That position is not just legally insufficient, it is factually untenable. To begin with, any member of the Medical Staff, including Dr. Hamrick and the Non-Appealing Plaintiffs, are free to seek election to the positions that comprise the MSEC. Even as non-members, they have access to these meetings. The meetings are openly noticed and the minutes reflect the attendance of non-members. Doctors and staff have always been allowed to attend and to speak at MSEC meetings. For example, MSEC meeting minutes show that nine individuals who are not MSEC members and

⁶⁹ Dr. Hamrick's Brief at 12-13.

⁷⁰ For example, even if the OHPA applies to MSEC meetings, W. Va. Code §16-5G-3 provides that the governing body of a hospital may require individuals desiring to address the body to register to do so no later than fifteen minutes prior to the time the governing body's meeting is scheduled to begin.


who have no connection to this litigation attended the December 8, 2005 MSEC meeting.⁷¹ The MSEC has no control over which medical staff members choose to attend its meetings and which medical staff members choose not to attend. In any event, attendance at meetings by medical staff members who are not on the MSEC has nothing to do with the outcome. The MSEC is not compelled to vote in accordance with a straw poll of non-member doctors who show up for their meetings.

V. CONCLUSION

For the foregoing reasons, this Court should affirm the Circuit Court's ruling that the OHPA provides for only one "governing body" and that, at CAMC, the Board of Trustees (and not the MSEC) is the "governing body" subject to the open meetings provisions of the Act.

**CHARLESTON AREA MEDICAL CENTER,
INC.,**

By SPILMAN THOMAS & BATTLE, PLLC



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⁷¹ CAMC Mem. in Supp. of CAMC's Mot. for Summ. J. at Ex. H. Although not part of this appeal's designated record, CAMC wishes to briefly address Dr. Hamrick's fabricated reference to the fact that "the doctors were only given fifteen minutes to address the issue" of patient care at the December 2005 MSEC meeting. Dr. Hamrick's Brief at 13. The October 11, 2005 motion and attachments clearly indicate that the plaintiffs' lawyer was the individual seeking permission to attend a different MSEC meeting (other than the one the parties had originally agreed upon) to speak about the above concerns. See Dr. Hamrick's Mot. to Allow Pls.' Representative to Attend and Speak at the Nov. 10, 2005 CAMC MSEC and attached letters. Dr. Dans, one of the Non-Appealing Plaintiffs, attended and spoke at previous MSEC meetings without incident and without his attorney. The point of his motion was to get his lawyer into the room with him. *Id.*

IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

R. EDWARD HAMRICK, JR., M.D.,

Plaintiff below, Appellant,

v.

Docket No. 33107

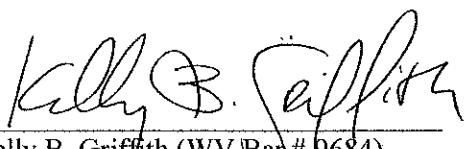
**CHARLESTON AREA MEDICAL CENTER, INC.,
a West Virginia Not For Profit Corporation,**

Defendant below, Appellee.

CERTIFICATE OF SERVICE

I, Kelly B. Griffith, do hereby certify that I have served the foregoing **"Response to Brief of Dr. Hamrick"** upon counsel of record on October 10, 2006, by forwarding true and exact copies of same in the regular course of the United States mail, as follows:

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